

In the Matter of

Petition of Waiver of Deadlines In 47 C. F. R. §54.307(c)

CC Docket No. 96-45

¹ See 47 C.F.R. § 1.3; 47 C.F.R. § 1.925.

Telecommunications Carrier in the State of Colorado. As such, San Isabel is eligible to receive rural high cost universal service support pursuant to Section 54.307 of the Commission's rules, which provides for support to competitive ETCs.³ In order to obtain support beginning with the first quarter of 2003, a competitive ETC must have filed a certification with the FCC by October 1, 2002, stating that all federal high cost support received would be used for the provision, maintenance, and upgrading of facilities and services for which the support is intended (Section 54.314 certification).⁴ However, the Commission's certification rules fail to provide a supplemental certification mechanism for carriers that are granted ETC designation after October 1, 2002, thereby creating a delay in funding of up to one year for new ETCs.⁵

San Isabel attempted to self-certify with USAC and the FCC on April 1, 2003 because the San Isabel was told by the CPUC that it would not certify CLECs on a *prospective* basis that USF support *would* be used for its intend purpose. San Isabel also filed working loop data on June 30, 2003 in accordance with Section 54.307 of the Commission's rules.⁶ Given the self-certification and line count filings, San Isabel expected to receive USF by at least the 4th quarter of 2003 (absent the FCC's granting of San Isabel's Section 54.314 certification waiver request to receive support for all of 2003). However, the FCC told San Isabel that the self-certification would not be accepted and that the CPUC would need to certify San Isabel prior to USAC giving support payments to San Isabel. After additional discussions and clarifications, the

² See 47 C.F.R. § 54.307(c).

³ See 47 C.F.R. § 54.307(c).

⁴ See 47 C.F.R. § 54.314(a)

⁵ See 47 C.F.R. § 54.314.

⁶ Section 54.307 requires competitive ETCs to file working loop data in accordance with a quarterly schedule as a prerequisite for the receipt of universal service support.

CPUC did certify San Isabel pursuant to Section 54.314(a) on September 24, 2003. This state certification ensures that San Isabel is eligible to receive support beginning in 2004. But since San Isabel has been an ETC since December 30, 2002, it has asked the Commission in a separate proceeding to issue a waiver of the Section 54.314 certification requirements necessary for San Isabel to receive support for all of 2003.

In order for San Isabel to receive support for the first two quarters of 2003, it would have needed to file line counts on September 30 and December 30, 2002. However, filing loop counts on those dates would have been impossible since San Isabel was not even deemed an ETC until December 30, 2002.

In addition, San Isabel would have needed to file loop counts on March 30, 2003 in order to receive universal service support in the 3rd quarter of 2003. However, San Isabel could not have filed line counts on that date because the CPUC did not issue a Section 54.314 certification for San Isabel until September 24, 2003 despite previous requests.

Further, given the uncertainty of whether the CPUC would issue Section 54.314 certification for San Isabel and the short time frame between when the certification was made on September 24 and the September 30, 2003 line count filing deadline, San Isabel did not file line counts by September 30th.

Finally, given the confusion that resulted from this entire process, San Isabel did not file line counts by December 30, 2003. Waivers of the September 30 and the December 30, 2003 line count filing deadlines are needed in order for San Isabel to receive support in the 1st and 2nd quarters of 2004.

BACKGROUND

San Isabel is a CLEC serving rural areas of Colorado. On September 24, 2001, San Isabel filed an application for designation as an ETC with the CPUC. San Isabel's request was not granted until December 30, 2002. Upon being designated as an ETC, San Isabel immediately contacted USAC about what it needed in order for San Isabel to receive universal service support. San Isabel was told that in order to receive support beginning in January 2003, it would have needed to have filed line counts by September 30, 2002, three months before San Isabel was designated as an ETC. Specifically, USAC will apply the following schedule in relation to support payments sought by San Isabel as an ETC.⁷

54.307(c) Submission Date⁸	Line Data for Submission	Support Quarter
September 30, 2002	As of March 30, 2002	1 st Quarter, 2003
December 30, 2002	As of July 31, 2002	2 nd Quarter, 2003
March 30, 2003	As of September 30, 2002	3 rd & 4 th Quarters, 2003
September 30, 2003	As of March 30, 2003	1 st Quarter, 2004
December 30, 2003	As of July 31, 2003	2 nd Quarter, 2004

⁷ It is important to note that this schedule of tying line count filings to future support payments is not contained in any FCC rule or in any USAC or NECA document available to the public.

⁸ Section 54.307(c) also provides for a July 31 submission using December 30 line count data from the previous year. However, this line count data does not seem to be necessary for ETCs to receive payment for any particular quarter, if the other quarterly submissions are made.

The schedule above illustrates the “Catch 22” in which ETCs find themselves with respect to line count submissions and universal service support requests. In San Isabel’s case, in order to have received support in the first two quarters of 2003, San Isabel would have had to file line counts by September 30 and December 30, 2002. The first submission would have therefore needed to have been filed three months prior to the day San Isabel became an ETC on December 30, 2002. The second submission would have needed to be made on that day itself. Similarly, in order for San Isabel to have received support in the 3rd and 4th quarters of 2003, it would have needed to have filed line counts on March, 2003, nearly six months prior to the date when the CPUC issued a Section 54.314 certification for San Isabel. As previously mentioned, San Isabel has already sought a waiver in a separate pleading of the Section 54.314 certification necessary for San Isabel to receive USF in 2003.

The Commission did not intend such a result. Since the majority of newly designated ETCs are competitive carriers, USAC’s processing policy for Section 54.307 data unfairly handicaps new entrants and violates the Commission’s well established universal service policy of competitive neutrality. Furthermore, the Commission has repeatedly recognized that the designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas. Forcing competitive ETCs such as San Isabel to experience a delay in receipt of universal service support *after receiving ETC designation* is not in the public interest and undermines the Commission’s commitment to resolve Section 214(e) ETC designations expeditiously. The Commission committed to resolving ETC requests within 6 months (and encouraged states to do the

same) out of concern that excessive delay in the designation of competing providers may hinder competition and the availability of service in high-cost areas.⁹

San Isabel requests a waiver of the March 30, 2003 and the September 30, 2003 line count submission requirements because the uncertainty of whether the CPUC would issue a Section 54.314 certification by October 1, 2003. The certification took place only six days after the Section 54.314 certification was granted.

Finally, because of the confusion caused by the conflicting messages provided to San Isabel by the USAC, the CPUC, and the FCC, San Isabel requests a waiver of the December 30, 2003 line count filing deadline. Granting of this portion of the request will allow San Isabel to receive support for the 2nd quarter of 2004.

REQUEST FOR WAIVER

Section 1.3 of the Commission's rules provides the Commission with discretion to waive application of any of its rules upon a showing of good cause. In addition, Section 1.925(b)(3) provides for waiver where it is shown that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁰

⁹ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, 15 FCC Rcd. at 12264-65, para. 114.

¹⁰ See 47 C.F.R. § 1.925 (b)(3)

Federal courts have also recognized that “a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such a deviation would serve the public interest.”¹¹ The Commission “may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”¹²

As explained above, USAC’s policy of linking Section 54.307 data submission to the future receipt of certain support payments creates an unintended consequence with respect to San Isabel by delaying USF support beyond the first quarter of 2003. This result is inconsistent with and frustrates the underlying purposes of the Commission’s rules. It is also inequitable and unduly burdensome to San Isabel. In order to avoid the denial of support it now faces, San Isabel would have had to make its first Section 54.307 filing by September 30, 2002, three months prior to its receipt of ETC status. Therefore, strict application of the Section 54.307 deadlines is inconsistent with the public interest.

¹¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990); *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert denied*, 409 U.S. 1027 (1972)

¹² *Northeast Cellular Telephone Co.*, 897 F. 2d 1166 (*citing WAIT Radio* 418 F.2d at 1159).

For the reasons stated herein, San Isabel submits that granting a waiver of the filing deadlines in Section 54.307(c) of the rules to allow it to receive support beginning on January 1, 2003, and for the 1st and 2nd quarters of 2004, is appropriate, consistent with the Commission's statutory goal of preserving and advancing universal service, and will advance the public interest. Expedited action is requested to minimize the economic and competitive damage that further delay in the receipt of support is causing to San Isabel.

DATED this 12th day of February, 2004

Paula Wagner Gordon
Vice President, Carrier Relations